KUALA LUMPUR.

(BRITISH MILITARY ADMINISTRATION)

Re K. S. MENON.

[Orig. Crim. Jurisdiction (A. J. Bostock-Hill, President) January 28, 1946]

Bail — Discretion of High Court to grant bail — F.M.S. Criminal Procedure Code S. 388 and S. 389 — Penal Code S. 436 — Meaning of "human dwelling".

The accused in this case was charged under Section 436 of the Penal Code, with having committed mischief by fire, with intent to destroy a building ordinarily used as a human dwelling. The offence was punishable with penal servitude for life. Counsel for the accused applied for bail.

Held, that though a Judge has under Section 389 of the Criminal Procedure Code absolute discretion in granting bail, that discretion must be exercised judicially and he should not (except for exceptional and very special reasons) grant bail, if there appear reasonable grounds for believing that the accused has been guilty of an offence punishable with death or with penal servitude for life.

Cases referred to:—

(1) *King-Emperor v. Nga San Htwa* I.L.R. 5 Rangoon 276.

(2) *King-Emperor v. Joglekar* I.L.R. 54 Allahabad 115.

APPLICATION FOR BAIL.

R. Ramani for the accused.

Major G. Fricker for the prosecution.

A. J. Bostock-Hill (President):—The accused in this case is charged under section 436 of the Penal Code, with having committed mischief by fire, intending thereby to cause, or knowing it likely that he would cause, the destruction of a building ordinarily used as a human dwelling, namely the Manager's bungalow at Seafield Estate. An offence under this section is punishable with penal servitude for life.

Mr. Ramani for the accused, in applying for bail, based his arguments (a) on legal grounds and (b) on the merits of the case, if I held that I had discretion. First he raised the point as to whether the phrase in sec: 388 "punishable with death or penal servitude for life" should be read disjunctively or not. In *King Emperor v. Nga San Htwa*[1] the Full Bench held that it must be read disjunctively as if it ran "with death or with transportation for life". I respectfully agree with this finding though for a different reason. In my opinion, to read it as if it only referred to offences punishable with the alternatives of death or penal servitude for life, would lead to the absurd conclusion that a man charged with an offence punishable with death only will be in a better position as regards obtaining bail than if he were charged with an offence punishable with death or penal servitude for life. Next he argued that section 389 of the Criminal Procedure Code gave me (sitting as the Court of a Judge) complete discretion as regards granting bail, free from the limitations contained in section 388. He relied on the words of section 389 namely:

> "and a Judge may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail. . . ."

This has been held by a Full Bench in India to give the High Court absolute discretion in granting bail, free from the limitations of the discretion prescribed by section 388. (see *King Emperor v. Nga San Htwa* [1], and *King Emperor v. Joglekar*[1]). I respectfully agree with this ruling. Also in the first of the above two cases, Rutledge C. J. says,

> "Though the discretion is absolute the High Court must exercise it judicially, and since the Legislature has chosen to entrust the initial stage of dealing with questions of bail to Magistrates and while giving Magistrates an unfettered discretion of granting of bail in all cases except two classes, i.e. cases punishable with death and cases punishable with transportation for life, the High Court ought not to grant bail in such cases except for exceptional and very special reasons".

Accordingly I hold that I have discretion to grant bail in this case (probably I have it anyhow under Rule 10 (2) of the Military Courts Procedure Rules) but that, exercising it judicially, I should not (except for exceptional and very special reasons) grant bail, if there appear reasonable grounds for believing that the accused has been guilty of an offence punishable with death or with penal servitude for life.

It therefore becomes necessary to have some facts before me on which to base an opinion. I therefore looked, with Mr. Ramani's concurrence, at the statements of the witnesses for the prosecution, copies of which were in the hands of both the prosecution and the defence.

There I found allegations from several witnesses that the acused had set fire to the Manager's bungalow in the estate. I saw no evidence as to whether it was inhabited or not, but, as Mr. Ramani pointed out, there were statements that there was lallang in the

portico and near the bungalow. I have therefore to decide whether the case prima facie falls under section 436 of the Penal Code or under some less serious section (probably section 435). In other words, was the building "ordinarily used as a human dwelling". I came to the conclusion that it came within that expression. There is no doubt that a Manager's bungalow is *prima facie* meant for a human dwelling, and even if, as Mr. Ramani suggested, from the presence of lallang in the portico it should be inferred that it had not been so used for a considerable time, yet I am of opinion that it is ordinarily so used, within the meaning of section 436 of the Penal Code.

Neither *Ratanlal* nor *Starling* (both on Indian Criminal Law) is very helpful on this point, but *Gour* (5th edition) page 1505 para. 5339 seems to infer that the important point is suitability rather than continual daily use. Hence, though not without some doubt, I hold that the Manager's bungalow was a building ordinarily used as a human dwelling, within the meaning of s. 436.

That being so, for the reasons given above I feel that there are no exceptional or very special reasons which would justify me in exercising my discretion to grant bail. In any case the charge is a very serious one, and also the accused is a mandor or conductor on the estate on which the witnesses are coolies. It is, as the prosecution suggested, very possible that he might, if on bail, exercise undue influence over those witnesses and their evidence. Mr. Ramani stated that his client would give an undertaking not to visit the estate if he were released on bail, but I feel that such an undertaking might or might not prove effective.

For the above reasons the application for bail is refused.

Application refused.